

**STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES**

Before the Commissioner of Financial and Insurance Services

In the matter of

Order No. 06-008-M

[insurance company name]

**Issued and entered
this 4th day of April 2006
by Frances K. Wallace
Chief Deputy Commissioner**

NOTICE AND ORDER OF PROHIBITION PURSUANT TO MCL 500.2236(5)

In *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), the Michigan Supreme Court reversed a Court of Appeals decision that had invalidated an insurance policy provision requiring a claim or suit for uninsured motorist benefits to be brought within one year from the date of the accident. The Supreme Court decision held that: “the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties” The Court also emphasized that the Legislature has delegated to the Commissioner the authority to determine the reasonableness of insurance policy provisions.

Clearly, the Legislature has assigned the responsibility of evaluating the “reasonableness” of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance. The statute permits, but does not require, the Commissioner to disapprove or withdraw an insurance contract if the Commissioner determines that a condition or exception is unreasonable or deceptive. The decision to approve, disapprove, or withdraw an insurance policy form is within the sound discretion of the Commissioner. [Rory, *supra* 473 Mich at 475 (footnote omitted).]

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Under section 2236(5) of the Insurance Code, MCL 500.2236(5), the Commissioner may disapprove, withdraw approval, or “prohibit the issuance, advertising, or delivery” of objectionable policy forms. That subsection provides:

Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or ***prohibit the issuance, advertising, or delivery of any form*** to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner’s decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner’s disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately.

[MCL 500.2236(5) (emphasis added).]

Although the Supreme Court did not reach the question whether a one-year limitation is reasonable, the Court of Appeals did. In *Rory v Continental Ins Co*, 262 Mich App 679; 687 NW2d 304 (2004), the Court of Appeals unanimously concluded that a one-year limitation for making claims or filing suit for uninsured motorist benefits is unreasonable. The Court of Appeals held that the limitation is unreasonable because in many circumstances one year is too short to allow claimants to determine whether they have a claim. The Court of Appeals reasoned:

The uninsured motorist endorsement at issue provides that a claim or suit must be brought within one year of the accident. We conclude that the one-year contractual limitations period is not reasonable under *Timko*, and *Herweyer*, *supra*. Uninsured motorist coverage pays compensatory damages that a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of a bodily injury sustained by the covered person caused by an accident arising out of the ownership, maintenance, or use of an uninsured motor vehicle. The owner or operator of the uninsured vehicle is only subject to tort liability for noneconomic loss if the injured (covered) person has suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1). MCL 500.3135(7) defines “serious impairment of a body function” as “an objectively manifested impairment of an important body function

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that affects the person's general ability to lead his or her normal life." An insured may not have sufficient time to ascertain whether an impairment will affect his ability to lead a normal life within one year of an accident. Indeed, three of the factors to be considered in determining whether a serious impairment exists are the duration of the disability, the extent of residual impairment, and the prognosis for eventual recovery. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Further, unless the police report indicates otherwise, the insured will not know that the other driver is uninsured until suit is filed, and the other driver fails to tender the defense to an insurance company. The insured, thus, must file suit well before the one-year period in order to assure that the information is known in time to make a claim or file suit against the insurance company within one year of the accident. Applying the standard set forth in *Camelot*, supra at 12, and repeated in *Herweyer*, and *Timko*, we conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced, (2) under these circumstances, the time will often be "so short as to work a practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained. [*Rory v Continental Ins Co*, supra, 262 Mich App at 685-686.]

In light of the three-year statute of limitations for bringing an action for personal injury claims, the Court of Appeals concluded that a three-year limitation would not be unreasonable.

The Court wrote:

[T]he Legislature has provided a three-year limitations period for personal injury claims. The insured must sue the other driver within three years of the injury, whether or not the insured has sufficient information to know if a serious impairment has been sustained, *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995), and whether or not the other driver is insured. Application of the three-year period would not deprive the insured of a sufficient opportunity to investigate and file a claim and does not work a practical abrogation of the right. [262 Mich App at 687.]

In a series of orders issued in December 2005 (the December Prohibition Orders), the Chief Deputy Commissioner of OFIS concluded that the Court of Appeals' analysis in *Rory v Continental* was compelling. In addition, those orders noted that the Secretary of State's staff advised that potential claimants cannot obtain complete and up-to-date information whether a

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driver was insured on any given day from that office. Although the Secretary of State requires proof of insurance at the time a vehicle registration is issued, it does not retain those proofs of insurance in its records.

In light of the statutory limitations on claiming noneconomic damages in MCL 500.3135(2), the appellate court decisions interpreting those limitations, the Court of Appeals analysis in *Rory v Continental Ins Co*, and the fact that the Secretary of State's office cannot confirm whether a person was insured on the day of an accident, the December Prohibition Orders concluded that a limitation of less than three years is unreasonable for uninsured motorist coverage. Under these circumstances, policyholders who purchase optional uninsured motorist benefits with a limitation of less than three years to file claims or commence suit for those benefits will often be paying for coverage that is illusory as a practical matter. Therefore the Orders concluded that such a provision is "misleading" and "unreasonably or deceptively affect(s) the risk purported to be assumed in the general coverage of the policy" within the meaning of section 2236(5).

Accordingly, the December Prohibition Orders directed insurers not to issue, advertise, or deliver to any person in this state a policy or rider that limits the time to file a claim or commence suit for uninsured motorist benefits to less than three years unless the insurer was legally using that policy or rider form in Michigan prior to the date of the order. Moreover, the orders directed insurers not to modify in any respect a policy form or rider containing a provision limiting the time to file a claim or commence suit for uninsured motorist benefits to less than three years that it was legally using in Michigan prior to this notice and order of prohibition and thereafter issue, advertise, or deliver the revised policy form or rider in this state, unless the limitation was deleted entirely or was changed to not less than three years from the

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date of the accident. The December Prohibition Orders did not prohibit insurers from continuing to use any policy form or rider they may have been legally using in Michigan prior to the date of the orders containing a limitation of less than three years to claim or file suit for uninsured motorist benefits, so long as such policy or rider is not revised in any respect. The orders noted that the Commissioner was considering what action is appropriate with regard to those policies or riders in use before the date of the orders.

It has come to the attention of OFIS that the same considerations applicable to uninsured motorist coverage apply with equal or greater force to underinsured motorist coverage.

Underinsured motorist coverage is an optional coverage that provides benefits for losses that a covered person is legally entitled to recover because of a bodily injury sustained by the covered person caused by an accident in excess of the amount available from the other person's insurance. As previously noted, there are practical problems with determining whether another person is insured before a lawsuit is filed. It is even more difficult to determine whether another person is underinsured. For example, a police report of an accident may disclose whether another driver has automobile insurance, but it will almost never disclose the limits of any such coverage. Moreover a proof of insurance form does not include the coverage limits. Given the statutory limitations on claiming noneconomic damages in MCL 500.3135(2), the appellate court decisions interpreting those limitations, the Court of Appeals analysis in *Rory v Continental* with respect to uninsured motorist coverage, and the difficulty in determining whether another person's coverage limits are adequate, a limitation of less than three years is unreasonable. As with uninsured motorist coverage, a person who purchases underinsured motorist coverage with a limitation of less than three years to file claims or commence suit for those benefits will often be paying for coverage that is illusory as a practical matter. Such a provision is "misleading"

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and “unreasonably or deceptively affect(s) the risk purported to be assumed in the general coverage of the policy” within the meaning of section 2236(5).

Accordingly, effective immediately on the date of this order, [insurance company name] shall not issue, advertise, or deliver to any person in this state a policy or rider that limits the time to file a claim or commence suit for underinsured motorist benefits to less than three years unless [insurance company name] was legally using that policy or rider form in Michigan prior to the date of this notice and order of prohibition. Moreover, [insurance company name] shall not modify in any respect a policy form or rider containing a provision that limits the time to file a claim or commence suit for underinsured motorist benefits to less than three years that it was legally using in Michigan prior to this notice and order of prohibition and thereafter issue, advertise, or deliver the revised policy form or rider in this state, unless the limitation is deleted entirely or is changed to not less than three years from the date of the accident.

This notice and order of prohibition does not prohibit [insurance company name] from continuing to use any policy form or rider that it may have been legally using in Michigan prior to the date of this notice of prohibition containing a limitation of less than three years to claim or file suit for underinsured motorist benefits, so long as such policy or rider is not revised in any respect.

The Commissioner is currently considering what action is appropriate with regard to those policies or riders in use before the date of this notice and order. The Commissioner may withdraw approval of those forms as provided in section 2236(5) at a future time. In addition, the Commissioner has prepared and submitted to the State Office of Administrative Hearings and Rules administrative rules that would prohibit insurers from using any new policy forms containing provisions that shorten the period of time within which a claimant may bring any

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action in law or equity against an insurer for claims arising under a personal insurance policy.

Those rules conclude that such shortened limitation of action clauses unreasonably reduce the risk purported to be assumed in the general coverage of the policy within the meaning of section 2236(5).

[Insurance company name] may request a contested case hearing to challenge this notice and order of prohibition by filing a request for contested case hearing pursuant to 1979 AC, R 500.2103 within 60 days after the date of mailing of this notice of prohibition.

A handwritten signature in black ink, reading "Frances K. Wallace". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Frances K. Wallace
Chief Deputy Commissioner



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
OFFICE OF FINANCIAL AND INSURANCE SERVICES
DEPARTMENT OF LABOR & ECONOMIC GROWTH
ROBERT W. SWANSON, ACTING DIRECTOR

LINDA A. WATTERS
COMMISSIONER

Memorandum

DATE: April 4, 2006

TO: All Companies Writing Property & Casualty Insurance

FROM: Frances K. Wallace
Chief Deputy Commissioner

SUBJECT: Notice and Order of Prohibition 06-008-M
Regarding Underinsured Motorist Coverage

Enclosed is the Notice and Order of Prohibition 06-008-M issued on behalf of the OFIS Commissioner pursuant to MCL 500.2236(5). As explained in the notice and order, it does not apply to policy forms currently in use so long as they are not modified in any respect.

It does prohibit the use of new and revised policy forms that limit the time to file a claim or commence suit for underinsured motorist benefits to less than three years.

If you have any questions regarding the Order, please call the Product Review Unit at 517-373-4948.